

## **Commercial Services in German local public transport**

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### **ABSTRACT**

Since 1996 German local public transport by road has been organised as a hybrid regime which allows for prioritised market-initiated services as well as contracted public services initiated by competent authorities. In 2012 the legal framework was amended, but the general setting of a hybrid regime was kept as well as the priority of commercial market initiatives. The new law came into force in 2013. It was expected that conflicting initiatives would possibly concern regional services, but not city networks due to the typically high level of subsidies. Surprisingly, in 2015 a market initiative competed successfully against the authority's intention to tender the contract for the urban bus network in Pforzheim. As of December 2016 a daughter company of Deutsche Bahn operates these services without any contractual compensation ('commercially'). The company formerly operating the services in Pforzheim had to be shut down. The paper gives an overview of the regulation of the German local public transport by road and describes the procedure through which commercial operators may gain access to the market. It provides a closer look at the Pforzheim case and concludes with an outlook on the (political) consequences of the case.

## 1. Introduction

Since entering into force on 3 December 2009 Regulation (EC) No 1370/2007 (“Regulation 1370/2007”) sets the rules in terms of state aid law and market access for public passenger transport services by rail and by road. It took Germany several years to amend the legal framework for bus and local transport on rails<sup>1</sup> according to the requirements of Regulation 1370/2007 (Karl 2013). The new legal framework entered into force in 2013. The result of much debate was a compromise that continues the principle of free entrepreneurship and market initiative, but combines it with the instruments of Regulation 1370/2007 enabling competent authorities to ensure adequate transport services. The definition of market-initiated services had to be adjusted to comply with Regulation 1370/2007 and is much narrower now. Market-initiated services still have legal priority over authority-initiated services. As public transport in Germany depends on average heavily on public funding it was expected that market-initiated services would not play a major role under the new framework, especially not in the expensive urban public transport traditionally operated by municipal companies. Several market initiatives that occurred nonetheless in 2015 and after took the industry therefore by surprise. In the case of Pforzheim the market initiative was successful and replaced the authority’s intention to tender a public service contract.

The Pforzheim case led mainly to local protests first. Fears of the public sector and the trade unions that Pforzheim would lead to similar cases soon provoked proposals to amend once more the PBefG in a way that would make a similar development elsewhere unlikely (see Bundestag-Drucksache 18/11748).

The paper will provide an overview of the German public transport regulation, the definition of market initiated services and the recent developments concerning such activities. It will describe the procedure through which commercial operators may gain access to the market and will provide a closer look at the Pforzheim example. Finally, the paper will give an insight into the current political debate in which the recent regulatory arrangement is questioned both by representatives of competent authorities/publicly owned companies and private operators.

## 2. National Legislation

The main legal basis of the German local and regional public transport by road<sup>2</sup> is the *Personenbeförderungsgesetz* (Federal Law on Passenger Transportation, ‘the PBefG’). Transport of passengers by road vehicles<sup>3</sup> requires an authorisation by the authority that issues the authorisations (‘regulatory authority’). Authorisations are issued either for single routes or for several routes if they are integrated or economically connected (‘route bundles’).

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<sup>1</sup> Public transport by road includes in Germany by legal definition bus services, light rail/rapid transit services, trolleybus services and taxi, car and driver hire as well as coach hire services. It comprises all ground transportation with the exception of rail transport which is regulated by a separate law (General Railways Act – Allgemeines Eisenbahngesetz, AEG).

<sup>2</sup> For the purpose of the paper ‘local public transport’ is used henceforth.

<sup>3</sup> Including tram and rapid transit vehicles; see footnote 1.

The authorisations are granted for a maximum of ten years in the case of bus services and up to 15 years for tram or rapid transit services.

In contrast to the now deregulated long distance bus services (Augustin et al. 2014) special rules apply for the local public transport which will be explained in the following sections 2.1 to 2.5.

## 2.1 Market access

The PBefG distinguishes for the local public transport two different regimes of market access. Which regime applies depends on the question whether the service is operated on the basis of a public service contract ('non-commercial service') or not ('market-initiated service'), see Figure 1. A market-initiated service is a 'commercial service' (further details section 2.2) which requires only an authorisation for the market access. The operator of a non-commercial service must have been awarded, either competitively or directly, a public service contract and in addition needs an authorisation as well.

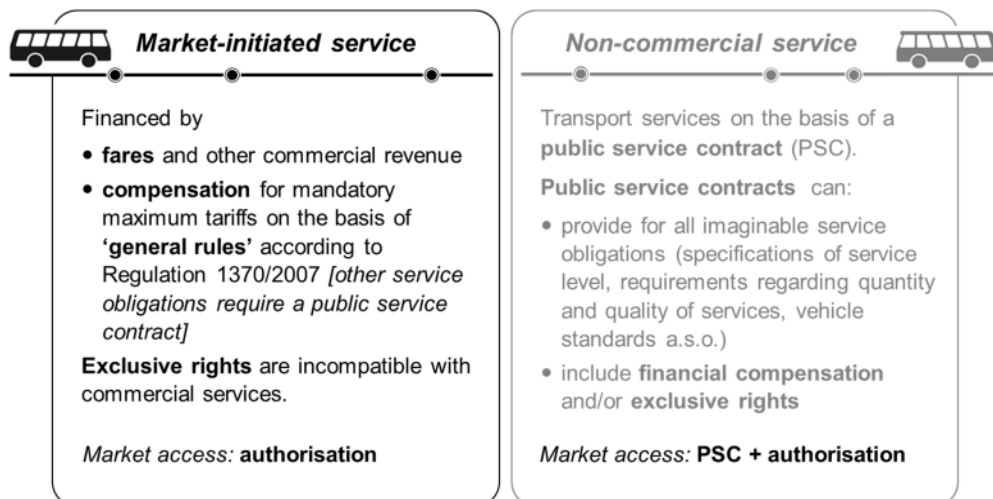


Figure 1. Market access regimes for commercial and non-commercial services (Source: Own)

The procedure for resolving a possible conflict between a market-initiated and a non-commercial service is described in section 2.5.

## 2.2 Authorisation prevents competition in the market

Generally, only one authorisation is granted per route. Competing or parallel services are not allowed. It is (theoretically) possible that the regulatory authority issues more than one authorisation, but that would require that the public interest is not harmed. The PBefG emphasises the public interest as follows (paraphrasing Paragraph 13(2) No 3):

- a) it is in the public interest that existing transport services meet the demand adequately – a gap of supply should be closed

- b) it is not in the public interest when a new service does not improve materially the transport services already offered by the incumbent operators and rail undertakings (there is no gap of supply)
- c) if incumbent operators and rail undertakings are willing to modify their services within a period set by the regulatory authority, an additional service is not necessary (gap of supply exists, but it is closed by an incumbent operator)
- d) a new service must not aim at single profitable routes or a sub-network which belong to an existing network or route bundle

Any violation of the public interest results in a rejection of the application for a competing parallel service. Recent examples for parallel services are very rare, if not unheard-of.

It is rather obvious that the authorisation protects the holder from competition and grants thereby in practice, if not exactly in theory, an exclusive operating right (see for instance European Commission 2014: 7). Compatibility with Regulation 1370/2007, which requires the conclusion of a public service contract for granting an exclusive right, is at least doubtful. The federal government and the Ministry of Transport (see for instance Bundestag-Drucksache 18/11160, p. 8) argue that the legal grounds for the refusal of parallel authorisations do not match the definition of an exclusive right as laid down in Regulation 1370/2007.<sup>4</sup> The protective effects of the authorisation are in their opinion below the level of an exclusive right. It is further argued that, even if one assumed that the authorisation is to be characterised as an exclusive right, the authorising procedure itself would already comply in principle with the conditions stated in Article 5(3) Regulation 1370/2007 for the award of an exclusive right (open to all operators, fair, transparent and non-discriminatory).<sup>5</sup> Commentators question nonetheless the legitimacy to grant holders of authorisations a position which in effect equals an exclusive right (Saxinger 2013: 8 ff.). So far, national jurisdiction confirmed the regulatory concept from the national legal perspective; the concerned law suits gave no occasion for the courts to question the compatibility of the concept with the European law. Several court rulings exist that declare the authorisation to be an exclusive right. This remained without consequences as the rulings either referred to the legal position before the latest amendment of the PBefG or are still under appeal.<sup>6</sup> A ruling by the highest judicial authority is still pending.

It follows that in Germany a commercially operated local public transport service cannot be compared fully with a commercial service provided in a market with open access.

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<sup>4</sup> Article 2(f): “‘exclusive right’ means a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator’

<sup>5</sup> It should however be mentioned that several of the formal requirements of Regulation 1370/2007 are not targeted by the authorisation procedure: There is for instance no specific publication pursuant to Art. 7(2) Regulation 1370/2007, and no formal ‘notification of tender’ implicitly preconditioned by Art. 5(3) Regulation 1370/2007. Apart from that, the regulatory authority, which issues the authorisations, is not equivalent to the competent authority; only the latter is addressed by the competences of Regulation 1370/2007.

<sup>6</sup> Verwaltungsgericht Augsburg (Administrative Court of Augsburg), Judgement of 24 March 2015, Au 3 K 13.2063 + Au 3 K 14.34

### 2.3 Definition of market-initiated services and authorisation procedure

Market-initiated services were formerly defined very broadly: They could include any amount of public subsidy prior to the amendment of the PBefG in 2013, with the consequence that the majority of the routes were not subject to an award procedure despite the public funding (for more detail see Karl 2013). After the long-overdue amendment of the PBefG market-initiated services are now defined as services that cover their costs exclusively with fare revenue, other commercial revenue, and compensation for complying with maximum tariffs established by general rules according to Article 3(2) or (3) Regulation 1370/2007 (first sentence of Paragraph 8(4) PBefG). As compensation on the basis of general rules go along with a market-initiated service general rules gained high prominence after 2013 (see section 2.4).

Market access of a commercial service can occur in two different constellations:

- a) 'independent' market-initiated service – the competent authority has no intention to award a PSC
- b) market-initiated service competes the competent authority's intention to award PSC

In addition, competing market initiatives are in both constellations possible.

An operator interested in a commercial service must apply for an authorisation. The PBefG sets different time limits for the constellations (see Figure 2): In the situation described under a), the application must be submitted twelve months before the start of operation; for situation b), the application must be submitted within a period of three months after the competent authority publishes its intention to award a contract. A closer look will be taken on the latter constellation in section 2.5.

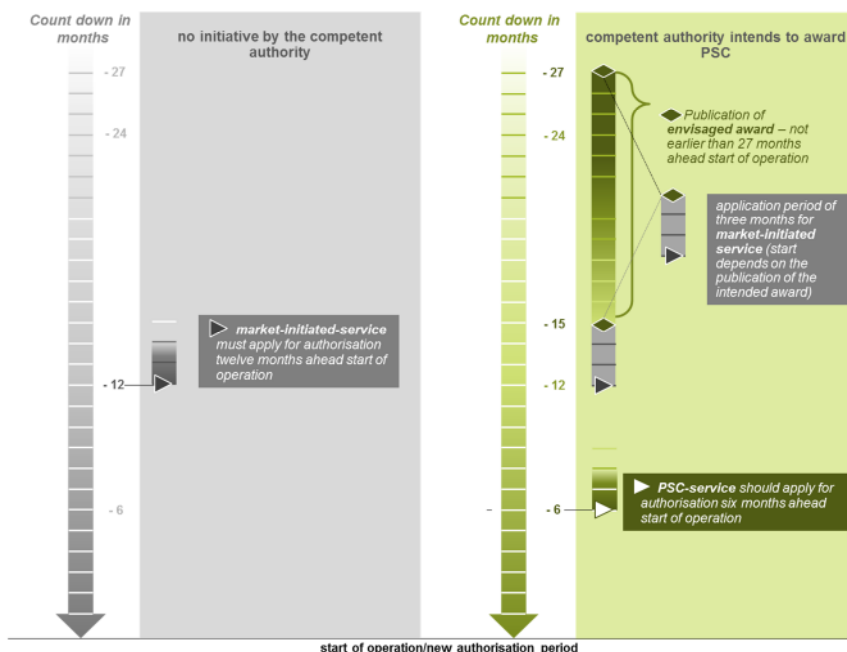


Figure 2. Comparison of the time limits for the application for authorisation (Source: Own)

If more than one operator requests an authorisation for the same route/route bundle the regulatory authority has to decide which one of the applications offers the best service (Paragraph 13(2b) PBefG). If the incumbent operator is among the applicants, and has been so far providing services in accordance with the public interest, the regulatory authority must consider this application appropriately (Paragraph 13(3) PBefG). This principle provides the incumbent operator with a certain advantage – an advantage unknown either to the European procurement law or to the procurement rules of Regulation 1370/2007.

## 2.4 Significance of general rules

As mentioned in the previous section 2.3, the costs of market-initiated services can be covered with compensation for complying with maximum tariffs (concessionary fare compensation). Regulation 1370/2007 allows competent authorities to establish mandatory maximum tariffs via general rules according to Article 3(2). In addition to that, Member States may exclude from the scope of Regulation 1370/2007 general rules on financial compensation for fulfilling maximum tariffs for certain groups of persons, Article 3(3) Regulation 1370/2007.

General rules play an important role for the possible scope of market-initiated services in Germany. Traditionally, reduced fares are offered for pupils, students and apprentices and were compensated according to federal law (Paragraph 45a PBefG in conjunction with further federal and state norms). In addition to that, fare levels are generally settled for a region where an integrated public transport organisation exists ('Verkehrsverbund'). Since the entry into force of Regulation 1370/2007 compensation for complying with integrated fares was more and more converted to general rules.<sup>7</sup>

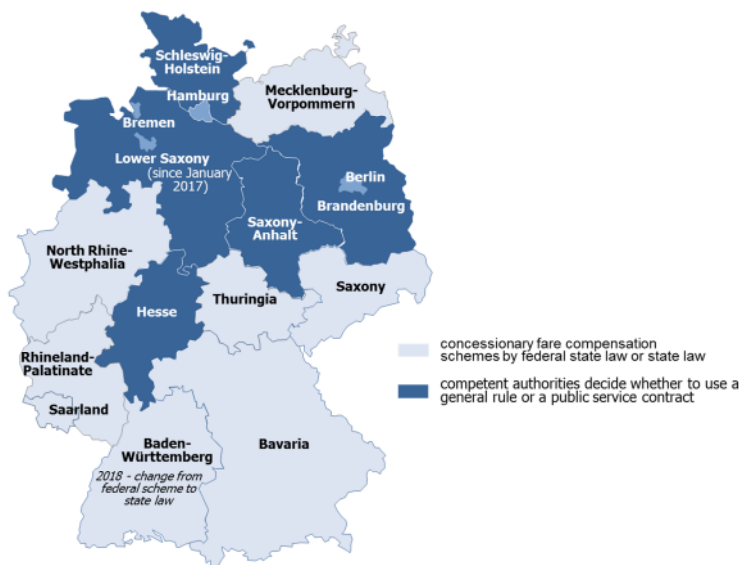
As compensation granted on the basis of general rules makes the operation of a market-initiated service more likely general rules may 'stabilise' the position of incumbent operators. The authorisation procedure is much less formalised than a tendering procedure and for certain constellations goes along with the legal advantage that is given to the application of the incumbent operator (see previous section 2.3). It is therefore an important strategy of private operators to emphasise general rules as an alternative to otherwise necessary tender procedures that require after all significant resources of the competent authority (capacity, know-how, preparation, etc.). Compensation granted via general rules is in the German practice, in some cases, very generous.<sup>8</sup>

The states gained the right to organise compensation for reduced fares for pupils, students and apprentices by themselves in 2007. The states follow different approaches with regard to leaving the decision to set up general rules to the (local) competent authorities, see the overview given in Figure 3.

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<sup>7</sup> Whether or not these general rules comply with all requirements of Regulation 1370/2007 is not focus of this paper. Noteworthy is the trend in several regions to grant the incumbent operators the same amount of money as was paid before, but then on a completely different legal basis, through new agreements declared to be 'general rules'.

<sup>8</sup> See footnote 7.



**Figure 3. German states' different approaches to the application of general rules (simplified) (Source: Own)**

It did not take long after the entry into force of the amended PBefG before the first action was brought before a court of law to enforce an alleged obligation of the competent authority to set up a general rule when compliance with integrated or maximum tariffs is made mandatory. The plaintiffs conclude that such an obligation must exist from the priority that is given to market-initiated services over non-commercial services by the PBefG. Up until now, all lower and higher courts concerned with such cases ruled against the alleged obligation.<sup>9</sup> The courts argue that Regulation 1370/2007 leaves the decision whether to use a PSC or a general rule up to the competent authority, and neither the prioritisation of market-initiated services by the PBefG nor other national legislation restricts that freedom. Some of the judgements have been appealed against and are pending before a higher court or before the Federal Administrative Court.

## 2.5 Decision between the different market access regimes

The PBefG provides a rather complex procedure to ensure the priority of market initiatives on the one hand and to guarantee on the other hand that competent authorities can establish public transport services which fulfil the requirements in the general interest. In a nutshell the procedure works as follows:

1. The competent authorities are required to define the necessary level and terms of public transport services in so called local public transport plans. The local public transport plan is a framework plan that must describe the required scope and quality

<sup>9</sup> For instance: Verwaltungsgericht Münster (Administrative Court of Münster), Judgement of 24. October 2014, 10 K 2076/12; Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia, Judgement of 25. August 2016, 13 A 788/15; Verwaltungsgericht Schleswig-Holstein (Administrative Court Schleswig-Holstein), Judgement of 22. November 2016, 3 A 351/15.

of the necessary transport supply, its environmental quality, the required level of integration of the different means of transport, and accessibility standards. Certain interest groups and the local transport operators have to be consulted.

2. If the competent authority considers it necessary that public service obligations have to be established to ensure the provision of the required level of services and fares, as outlined in the local transport plan, the authority has to publish its inclination to award a PSC. This publication has to specify the main public service obligations the authority intends to impose on the future public transport operator. The publication may refer to specifications of the local public transport plan. The authority has to publish the information at the very minimum a year before the release of the invitation to tender procedure or, respectively, before the direct award, but not earlier than 27 months before the planned start of operation. The PBefG makes use of the publication required by Article 7(2) of Regulation 1370/2007 ('prior information notice'), enhancing the mandatory information accordingly.<sup>10</sup>
3. The announcement of the intention to award a PSC starts a period of three months for applications to operate the service commercially ('market initiative'). Interested transport operators have to submit their application for the authorisation to the regulatory authority.
4. If applications are submitted the regulatory authority has to decide whether to approve or reject the application. The published requirements of the competent authority are the binding benchmark for this decision. The essential requirements published by the competent authority have to be met by the application for the authorisation; an exception is only possible if the competent authority accepts the deviation(s). If there are any doubts about the economic viability of the application, which must be given for the whole authorisation period, the regulatory authority can demand further supporting information of the applicant. Aside from these basic principles the PBefG stipulates additional rules for specified circumstances, but a further discussion would take us beyond the scope of this paper.

Two additional rules ensure that neither the competent authority nor the operators undermine the procedure: The competent authority (for instance in the case of an intended award to an internal operator) could be tempted to request very high standards which without any doubt no commercial operator could fulfil, but which neither could be seriously afforded by the competent authority. Therefore, if the competent authority deviates in the tender or direct award from the standards published beforehand, the time limit for the application of commercial operators (see point 3 above) is withdrawn – competing applications for the authorisation are once again allowed. On the other hand, an interested operator could be tempted to promise to fulfil all requirements of the competent authority without any intention or capability to actually do so at all or in the long term over the authorisation period. To deter operators from such strategies the PBefG stipulates that it is not possible for operators to

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<sup>10</sup> The preparation of the information about the intended PSC required by PBefG can be very time consuming. Especially in the first years after the amendment of the PBefG competent authorities sometimes, due to time problems, decided to 'split' the prior information notice into the notice required by Regulation 1370/2007 and a later notice according to the requirements of the PBefG.



withdraw from the service standards which were required by the competent authority and which the operator confirmed with the application for authorisation to fulfil.

### 3. Amended legal framework in practice – unexpected commercial initiatives

Almost all relevant actors did initially approve the amended legal framework of 2013. A much higher degree of legal certainty, the implementation of direct award options for publicly owned operators on the one hand and for private operators on the other hand, a clear procedure that ensures that competent authorities are able to realise a public transport level in the general interest, were, amongst others, seen as evident improvements.

Surprisingly, the much clearer rules allowed for competitive market initiatives in constellations where incumbent operators did not expect them at all. The most prominent example is the case of Pforzheim mentioned in the introduction (section 1), but other examples became public around the same time or followed. Figure 4 gives an overview of the most notable commercial initiatives. With the exception of Kiel, all examples took place in states with concessionary fare compensation schemes either by federal state law or by state law (see section 2.4).<sup>11</sup>



Figure 4. Examples of market initiatives that competed against an intended PSC award by the competent authority (urban networks) (Source: Own)

#### 3.1 Pforzheim case

What happened in Pforzheim? Pforzheim, a city with approximately 120,000 inhabitants, is located in the state of Baden-Württemberg. Pforzheim's bus network of about 20 routes amounts to approximately 4 million kilometres p.a. The competent authority announced its

<sup>11</sup> Note: Lower Saxony, with commercial initiatives in Oldenburg and Hildesheim, belonged to that category until 2016.

intention to tender the bus network in September 2014 (prior information notice). A second notice<sup>12</sup> followed in May 2015, providing in additional documents the specifications of the intended PSC according to PBefG-requirements described in section 2.5. The tender was planned as a competitive award combined with a sale of shares (share deal) of the municipal bus company SVP (Stadtverkehr Pforzheim GmbH & Co. KG).<sup>13</sup> The service level specified in the notice was below the service in operation at that time because of severe budget restrictions of the city. The annual compensation for the services prior to the intended tender amounted to over 4.5 million Euros. A possible commercial operation was considered, not least for that reason, as highly improbable.

The second notice started the three month period for applications for operating the intended services commercially. This was more or less seen as a mere formal act. But, within the three month period a daughter company of Deutsche Bahn, RVS (Regionalbusverkehr Südwest GmbH), applied for the authorisation to operate the services commercially.<sup>14</sup>

The application alone, before any positive or negative decision of the regulatory authority, became immediately a highly controversial political issue. The involved parties, the personnel of the competent authority, their consultants, the regulatory authority, RVS and its mother company Deutsche Bahn, were under pressure. SVP's staff reacted with strikes. Consensus amongst experts was that the commercial initiative could not have been foreseen. Market initiatives of a similar dimension were not known until then. Understandably, views of the public opinion and of the worried employees of SVP differed.

The most outstanding characteristic of RVS's commercial initiative was the fact that the application for authorisation did not only meet the standards specified by the city in the prior information notice. It did even guarantee a higher level of services – and that, to emphasise the point, without any contractual payments, saving the city of Pforzheim a total of several millions of Euros.

The regulatory authority, due to a legal obligation,<sup>15</sup> had to examine the long-term economic viability of the application profoundly. It came to the conclusion that the calculation was robust enough. In January 2016, the regulatory authority decided to approve RVS's application, which of course did not improve the situation.

The competent authority considered to file a suit against the regulatory authority's decision as it meant that the municipal operator would have to be shut down if the decision held. In the end, the competent authority did not go to court as the chances to win the case were estimated to be quite low. A time consuming pending case could have driven SVP into insolvency as it was highly probable that RVS, and not SVP, would have been granted temporary authorisations to operate the bus services during the court procedure.

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<sup>12</sup> See footnote 10.

<sup>13</sup> Quite often, the Pforzheim case is now incorrectly represented as an intended *direct award to an internal operator*; see for instance Landtag Nordrhein-Westfalen Drucksache 16/13534, p. 1.

<sup>14</sup> A second application was filed after the three month period and was later rejected as inadmissible for failure to meet the deadline.

<sup>15</sup> Federal Administrative Court of Germany, Judgement of 24. October 2013, 3 C 26.12

The date of RVS's takeover of the bus operation in Pforzheim was 11. December 2016. After the decision of the regulatory authority the union initiated unannounced strikes of SVP's personnel that went on for months. SVP could only provide a skeleton service. RVS helped out with a growing number of replacement services. The strike led to massive losses of revenue not only for the city's services but also for neighbouring operators because of the integration of the services. The city decided therefore in June 2017 to sue the union for the damages incurred as, in the city's view, the strike lacked a legal basis. Other legal suits are pending (labour court cases). RVS re-employed 65 of the SVP's former 200 employees.<sup>16</sup>

In December 2016 RVS started operations of the regular service. So far, RVS provides the services according to the required and guaranteed quality and level, and the passengers seem to be satisfied with the new bus service.

The city and RVS agreed to a procedure for their collaboration.

### **3.2 Other commercial initiatives**

Pforzheim is, so far, the only case where a commercial operator successfully competed against an intended tender of an urban bus network. Other successful initiatives occurred with tenders of regional services, but, such cases were anyway not thought improbable.

Figure 4 in Section 3 shows further commercial initiatives concerning urban networks. In most of these cases the commercial applications were rejected as the standards specified by the respective competent authority were not met (Oldenburg; Saarlouis; Esslingen; Gotha; Leverkusen). In some cases the commercial application was later withdrawn (Hamm). Some of the cases are still pending (Kiel).

Noteworthy is the case of Hildesheim: The constellation in Hildesheim was a bit similar to Pforzheim: a daughter company of Deutsche Bahn submitted an application for authorisation within in the three month period after the publication of the specifications of intended PSC. The city of Hildesheim (ca. 100,000 inhabitants) planned a direct award to SVHI (Stadtverkehr Hildesheim, municipal operator). The competing application of Deutsche Bahn led in this case to negotiations between the city and SVHI to agree to a lower wage level, thereby enabling SVHI to submit an own commercial application. The union and SVHI's personnel finally accepted the cuts. SVHI's personnel receives social settlement payments (difference between old and new wage and social security level) which is financed via cross-subsidisation by municipal holding companies ("Querverbund").<sup>17</sup>

The regulatory authority granted SVHI the authorisation with the argument that it contained the better service and rejected accordingly the application of the Deutsche Bahn subsidiary. Deutsche Bahn decided not to challenge the decision: A legal dispute takes up up to three or four years – regardless of the outcome of the case, such a long period would have undermined the original business case in any case.

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<sup>16</sup> RVS's wage level (private sector wage agreement) is lower than the wage level of SVP (public sector wage agreement); accusations of wage dumping are unsubstantiated.

<sup>17</sup> Whether or not such payments are in accordance with European state aid law or competition law is an open question.

#### 4. Conclusions

The Pforzheim case, and the other related cases, led to numerous political initiatives of public sector and union representatives to amend the PBefG in a way that makes takeovers of the bus networks of public operators by private operators unlikely. The subsequent draft bill was not successful for the time being, but it indicates strongly that the compromise reached by the previous amendment of the PBefG was seriously harmed by the development in Pforzheim and in other cities: For the public sector, the vital part of the compromise was the prospect of a continuation of municipal companies via direct awards to internal operators which is now, as it turned out that a commercial initiative might successfully compete, undermined.

Private operators defend their actions and point out that the legal arrangement allows for competing initiatives that, if they are successful, actually relieve the authorities of a heavy financial burden while at the same time the provision of adequate services is secured by the legal procedure. Private operators feel themselves under pressure as many municipalities opt for a direct award to an internal operator. One of the legal preconditions of such a direct award is that the internal operator is required to perform the major part of the public passenger transport service itself (Article 5(2)(e) Regulation 1370/2007). This results sometimes in lower quotas of subcontracts with private operators. Business opportunities for private operators seem therefore to stagnate or even to shrink.

An outsider might certainly, and rightly so, wonder what all the agitation is about, as Pforzheim will now save for a period of ten years several millions of Euros, which would otherwise have been spent as contractual payments for a service level below the successful market initiative. The answer to this question is manifold. An important piece is the former, de facto non-competitive, regulation of the German public transport which led to a very stable and widely unchallenged market demarcation between public and private operators (for further details see Karl 2013), and which is now acutely threatened.

The paper took the Pforzheim case as an occasion for a closer look at the current legal arrangement, which continues the peculiar protection of holders of an authorisation from competition, and at newly emerged strategies of preserving previous arrangements of financial support 'under the cover' of a general rule. These peculiarities alone – and there are many more – hint at the thin ice on which the current German regulatory arrangement of the public transport by road rests.

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